JUN 29 1970
E. ROBERT SEAVER, CLERK

SUPREME COURT OF THE UNITED STATES
October Term [redacted] 1970

No. 344

George G. Kilarjian, et. al:,

Petitioner,

-against-

United States of America, as owner of the USNS Blue Jacket,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1969

No.

GEORGE G. KILARJIAN, et. al.,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

TO THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on May 1, 1970.

Opinion Below

The opinion of the United States District Court for the Southern District of New York, dated October 3, 1969.

The opinion of the Court of Appeals for the Second Circuit is not as yet reported and is printed in full along with the opinion of the District Court as part of the appendix to this petition.

Jurisdiction of this court

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254 (1).

Questions Presented

1. Does the Foreign Claims Act, Title 10 U.S.C. Sec. 2734 (a) implementing the NATO-SOFA TREATY AGREEMENT provide an exclusive remedy for maritime collision claims against the United States, as held by the Court below, invalidating Title 10 U.S.C. Secs. 9801 - 9804, 9806 and precluding judicial relief in the District Court under the Public Vessel's Act; or, does it provide an ex gratia remedy available only for settlement of non-maritime foreign claims before suit is commenced?

2. Does the Foreign Claims Act, Title 10 U.S.C. Sec. 2734 (a) implementing the NATO-SOFA TREATY AGREEMENT preclude the right of Defendant-Appellant to counterclaim for collision damages in the District Court in Admiralty pursuant to provisions of Title 46 U.S.C. Sec. 783 of the Suits In Admiralty Act in a libel for collision damages filed by the United States—as clearly outlined in 32 C.F.R. Sec. 842.92, Rule 2, Note 2?

Reasons for Granting the Writ

The holding of the Court below, that the Foreign Claims Act Title 10 U.S.C. Sec. 2734 (a) provides an exclusive remedy for maritime wrongful death collision claims, precluding judicial relief in the District Court under the Public Vessel's Act, is in conflict with the decision of the United States Court of Claims in the case of *Bird & Sons, Inc. v. United States*, Jan. 23, 1970, reported in 420 F2d 1051, which holds that the Foreign Claims Act Title 10 U.S.C. Sec. 2734 provides only an ex gratia remedy which does not preclude judicial relief, as is indicated by the regulations implementing the Act. (32 C.F.R. Sec. 842.52(a), 842.68(a)2, 842.92 Rule 2, Note 2)

The holding of the Court below—that petitioner's right to counterclaim for collision damages in Admiralty against the United States was precluded by the Foreign Claims Act, Title 10 U.S.C. Sec. 2734 (a) implementing the NATO SOFA-AGREEMENT—conflicts with regulations implementing the Act (32 C.F.R. Sec. 842.68 (a) 2, 842.92 Rule 2, Note 2) and the decision of this Honorable Court in the case of *The Thekla*, 266 U.S. 328; 45 S.Ct. 112; 69 L.Ed. 313.

The Court below failed to consider the record of the minutes of the deliberations by the framers of the NATO-SOFA AGREEMENT, which unequivocally establishes that all maritime claims were excluded from the purview of the agreement; and, failed to consider the expressed "purpose" of the Foreign Claims Act—Title 10 U.S.C. Sec. 2734 (a)—not to effect any "substantive" change in existing law; and, thereby departed from the accepted and customary course of judicial proceedings in a manner requiring the supervision of this Honorable Court—insofar as the Court

below decides a vital novel question affecting maritime legislation respecting the intent of Congress undecided heretofor and which should be settled for the protection of all maritime claimants on an equitable basis in accord with the historic traditions of Admiralty Jurisprudence, and the Maritime Laws of all Nations.

Statement

The subject matter in suit treats with damages for wrongful death arising from a collision between the USNS Blue Jacket, a Public Vessel of the United States and a privately owned coastal freighter of German registry, M/V Dirk, on February 10, 1964, on the Weser river in German territorial waters.

On November 10, 1965, the Petitioner's predecessor Alfred M. Shafter instituted a suit indexed 65 Ad 1136 for wrongful death on behalf the dependents and next-of-kin of Georg Kostka, the deceased shipowner and master of the M/V Dirk, against the United States under the provisions of the Public Vessel's Act 46 U.S.C. Sec. 781, et. seq., which was dismissed on July 26, 1967 when Judge Marvin E. Frankel of the District Court for the Southern District of New York granted a government motion for summary judgment for want of subject-matter jurisdiction (273 F. Supp. 152). It was held that the treaty agreement must be read, "to exclude the concurrent and inconsistent jurisdiction" of the District Court under the Public Vessel's Act; (273 F. Supp. at page 156). This decision was affirmed by the Court of Appeals for the Second Circuit of New York—400. F2d. 584 (1968) and certiorari was denied.

On May 12, 1966 the government filed a separate libel indexed 66 AD 477 for collision damages to its vessel the

USNS Blue Jacket; asserting that jurisdiction of the District Court obtained over their property damage claim against the claimants herein represented by Alfred M. Shafter. Petitioners, having substituted for Alfred M. Shafter, moved for permission to amend their original answer and file a counterclaim for the wrongful death of Georg Kostka arising from the collision of the two aforesaid vessels.

The Court below on May 1, 1970, held that the petitioner's right to file a counterclaim for wrongful death herein against the government was precluded by Congressional assent to and implementation of the North Atlantic Treaty Status of Forces Agreement (NATO-SOFA)—in that the treaty created a comprehensive and exclusive scheme for adjudication and settlement, outside the jurisdiction of the United States District Courts, of a maritime claim against the United States for wrongful death, by a foreign administrative tribunal.

The petitioners respectfully seek to have this Honorable Court determine the force, and effect of the NATO-SOFA Agreement upon their right to assert a counterclaim in Admiralty against the United States for the wrongful death of Georg Kostka arising from the collision of the M/V Dirk with the USNS Blue Jacket, a public vessel of the United States; and, whether or not Title 10 U.S.C. Sec. 2734 (a), implementing the said treaty agreement provides an ex gratia remedy or an exclusive remedy under the circumstances of this case and in accord with the existing laws.

It is important to note that the holding of the Court below translates the treaty agreement to provide that the United States District Court does have jurisdiction over the subject-matter of the government's claim and all other property damage claims of shipowners, underwriters, and

cargo interests; but, that the Court's subject-matter jurisdiction of the wrongful death and personal injury claims has been withdrawn and substituted for by a foreign administrative tribunal.

The holding is diametrically opposed to the long established concepts of Admiralty Jurisprudence, the ancient fundamentals of the law of the sea, the basic principal of the historic development of the maritime law of all nations; and, the very precise expression of the Congress of the United States in the enactment of the Suits-in-Admiralty Acts known as the waiver statutes, and assumes greater proportions in this regard and of more vital importance herein insofar as the petitioners are left without any remedy whatsoever by reason of the fact that the claims of the petitioners have been rejected not only by the Courts below but by the foreign claims administrators as well and would hereafter be barred by limitation; if not by merger and bar upon the resolution of the government's libel herein against them.

Argument

1. The Foreign Claims Act Title 10 U.S.C. See. 2734, et. Seq. as amended (Supp. 1V 1969) provides an ex gratia remedy which does not preclude later judicial relief in the District Courts under the Public Vessel's Act; and, should be construed in the light of its purpose to promote and maintain friendly relations with inhabitants of foreign countries consistent with substantive rights provided by federal statutes and maritime laws to all maritime claimants alike.

2. When the United States sues in Admiralty an affirmative judgment may be rendered against it on a claim by petitioners growing out of the subject-matter (collision) of the government's suit, regardless of whether or not there has been a statutory waiver of sovereign immunity.

3. The judgment of the Circuit Court of Appeals for the Second Circuit affirming the lower Court failed to consider the purpose and intent of Congress and the legislative history of Title 10 U.S.C. Sec. 2734 et. seq. and/or the intent of the framers of the NATO-SOFA Agreement, which was distinctly designed to preserve the integrity, force and effect of all existing maritime legislation; and, did not contemplate any change in the substantive rights of maritime claimants, the laws governing them or the jurisdiction of the Courts thereof.

4. That a careful review of the legislation and the history thereof in this regard by this Honorable Court will establish the right of the petitioners herein to counterclaim against the government in the libel herein.

5. That the petitioners have been deprived of their substantive rights herein and thereby have been denied the equal protection of the laws as guaranteed under the Constitution.

POINT I

THE NATO-SOFA TREATY AGREEMENT AND IMPLEMENTING LEGISLATION TITLE 10 U.S.C. SEC. 2734(a) PROVIDE AN EX GRATIA REMEDY AND NOT AN EXCLUSIVE REMEDY.

The opinion of Judge Mansfield speaks of a strong Congressional policy and determination to place exclusive jurisdiction of maritime claims for wrongful death elsewhere than in the federal District Courts; but, on the contrary, the clear intent of Congress as expressed in the "Purpose" of title 10 U.S.C. Sec. 2734(a), was not to make any "substantive" changes in existing law. In the United States Code, Congressional and Administrative News—87th Congress, 2nd

Session, 1962, vol. 2. p. 2456, the purpose of the legislation is recited as follows:

> "This bill, as amended, is not intended to make any substantive change in existing law."

Surely, this would encompass the uniform maritime and admiralty laws and statutes of the United States, including the Suits-in-Admiralty Acts, and would concern also the exclusive subject-matter jurisdiction of the federal District Courts as defined and prescribed therein by the Congress.

All other references by the lower Court to Congressional policy and/or determination that the NATO-SOFA agreement and Title 10 U.S.C. Sec. 2734(a) was intended to provide an exclusive remedy over maritime claims is not supported factually or legally.

The judgment of the Circuit Court of Appeals holds as follows:

> "We believe that the wrongful death and personal injury counterclaim was covered by NATO-SOFA agreement, and thus not within the jurisdiction of the District Court. See *Shafter v. United States*, 273 F. Supp. 152, 153—56 (S.D.N.Y. 1967), aff'd. per curiam, 400 F2d. 584 (2d. Cir. 1968), cert. den. 393 U.S. 1086 (1969).

In *Shafter v. United States*, *supra*, Judge Marvin E. Frankel held that the treaty arrangements constituting the North Atlantic Treaty Status of Forces Agreement, "create a comprehensive and exclusive scheme for adjudication and settlement of claims within their purview," id. p. 153. He concluded that the Shafter claims for wrongful death and personal injuries must be considered withdrawn from the

Court's subject-matter jurisdiction.

These holdings are in conflict with the holding of Chief Justice Cowen in the case of *Bird & Sons, Inc. v. United States* - 420 F2d. 1051 (1970) to the effect that the Foreign Claims Act provides an ex gratia remedy which does not preclude later judicial relief. 10 U.S.C. Sec. 2734.*

Chief Judge Cowen states as follows:

p. 1057(5,6)

"Finally, the defendant contends that by "electing to pursue its remedies under the Foreign Claims Act, and not those provided for in the contract, plaintiff waived its right to seek relief based on the contract in this

* 10 U.S.C. Sec. 2734, as amended, (Supp. IV, 1969), in pertinent part, provides:

"**** To promote and maintain friendly relations through the prompt settlement of meritorious claims, the Secretary concerned or any officer designated by him may, under such regulations as the Secretary may prescribe, appoint one or more claims commissions, each composed of one or more commissioned officers of the armed forces under his jurisdiction, to settle and pay any claim for not more than $15,000, for -

(1) damage to, or loss of, real property of any foreign country or of any political subdivision or inhabitant of a foreign country, including damage or loss incident to use and occupancy;

(2) damage to, or loss of, personal property of any foreign country or of any political subdivision or inhabitant of a foreign country, including property bailed to the United States; or

(3) personal injury to, or death of, any inhabitant of a foreign country; if the damage, loss, personal injury, or death occurs outside the United States, or the Territories, Commonwealths, or possessions and is caused by, or is otherwise incident to non-combat activities of, the armed forces under his jurisdiction, or is caused by a member thereof or by a civilian employee of the military department concerned or the Coast Guard, as the case may be."

court. The short answer to this contention is that the Foreign Claims Act provides an ex gratia remedy which does not preclude later judicial relief. This is indicated by the Air Force regulations implementing the Act, 32 C. F. R. Sec. 842.52(a) (1969)"**

Needless to say it would appear, therefore, that the holding of the Court below is in error insofar as the right of the petitioners, herein, to commence suit in the District Court under the Public Vessel's Act is concerned; for the wrongful death of claimant's decedent, arising from the collision of the USNS Blue Jacket and the M/V Dirk.

POINT II

WHEN THE UNITED STATES FILES A LIBEL IN ADMIRALTY FOR COLLISION DAMAGES TO ITS PUBLIC VESSEL THE RESPONDENT MAY COUNTER-CLAIM FOR WRONGFUL DEATH.

It has been held that the Sovereign, by joining in suit accepts whatever liabilities the court may decide to be a reasonable incident to that act. *Luckenbach S. S. Co., Inc., et. al. v. The Thekla*, 266 U. S. 328, 45 S. Ct. 112, 69 L. Ed. 313.

** **** Since the Foreign Claims Act provides an ex gratia remedy, it should be broadly construed in the light of its purpose. In view of its expressed intent to promote and maintain friendly relations with inhabitants of foreign countries by expeditious settlement of meritorious claims, the United States must accept responsibility for almost all damage caused by members and employees of its armed forces. Some applicable acts and omissions are those which are criminal, negligent, willful, wrongful, and mere mistakes of judgment. Cause and merit are the primary criteria in determining applicability of the Act. Proof of fault is required only to the extent necessary to show that the claim is meritorious.

In that case, it was held that when the United States comes into court to assert a claim in Admiralty for collision involving two vessels, as herein concerned, the subject-matter in suite is not the vessel, but the collision. Libels and cross-libels for collision are one litigation and give rise to one liability. *Bowker v. United States*, 186 U.S. 135, 139; 22 S. Ct. 802, 804; 46 L. Ed. 1090.

The *Thekla, supra*, turns upon a relationship characteristic of claims in Admiralty arising from the collision of vessels which is entirely absent in other types of claims.

In *United States v. Shaw*, 309 U.S. 495; 60 S. Ct. 659; 84 L. Ed. 888, the Court held—60 S. Ct. at page 662 as follows:

> "The subject-matter of a suit for damages in collision is not the vessel libled, but the collision. Libels and cross-libels for collision are one litigation and give rise to one liability. In equal fault, the entire damage is divided. As a consequence, when the United States libels the vessel of another for collision damages and a cross-libel is filed, it is necessary to determine the cross-libel as well as the original libel to reach a conclusion as to liability for the collision."

The Thekla ruling was motivated by obvious considerations of public policy enacted into law in the Suits-in-Admiralty Acts of 1920, 46 U.S.C., Sec. 742.

In The Thekla case the United States was the owner, pro. hoc. vice., of the SS F. J. Luckenback, one of the vessels involved in the collision, which was the object of the case. Hence, as a shipowner operating ships which were constantly

exposed to collision, the United States could not claim sovereign immunity as a defense.

As early as 1797, the United States Congress recognized the injustice of the doctrine and modified it to the extent that when the United States brought a civil action against an individual, the individual defendant was allowed to set off debts due him from the government.

In 1857 Congress boldly took the first step toward making the government responsible for its debts by creating the Court of Claims. In 1877 Congress went further and gave concurrent jurisdiction to the United States Courts to entertain claims against the government sounding in contracts. Then by a series of acts, notably the Federal Employees' Compensation Act of 1916 (39 Stat. 742, 5 U.S.C. Sec. 751 et. seq.) the United States made itself liable to pay workmen's compensation to its employees.

Acknowledgment of governmental responsibility was further expanded by the passage in 1920 of the Suits-in-Admiralty Act, (41 Stat. 525, 46 U.S.C. 741 et. seq.) followed in 1925 by a similar act applying even to actual ships of war. And then finally Congress almost wholly dismantled the wall surrounding sovereign immunity by passage of the Federal Tort Claims Act of 1946, 60 Stat. 843, 28 U.S.C. Sec. 1346 (b).

After thus opening the gates of justice to American claimants, our government decided to make itself liable to foreign claimants as well because one should not be less just outside his house than he is under his own roof—in keeping with the American System of Jurisprudence which symbolizes equality for all.

The United States embarked on the policy of not claiming immunity for its publicly owned or publicly operated merchant vessels.

The decision of the court below is in direct conflict with this firm congressional policy insofar as it is based on the erroneous holding of Judge Marvin E. Frankel, in *Shafter v. U.S.A.*, 273 F. Supp. at page 156, that:

> "* * * * It seems equally clear that the specific and detailed remedial apparatus under the later treaty should be deemed to substitute, pro-tanto for the general consent to suits under the Statute."

The conflict is further dramatized by the simple fact that Congress has expressly provided that the "Purpose" of Sec. 2734(a) of Title 10 of the Foreign Claims Act is not to effect any "substantive" change in existing law; and, afortiori there is absolutely no verbal expression by Congress to support the holding of the Court below; which, rather than follow the will of Congress does violence to the fundamental concept and purpose of the Suits-in-Admiralty Acts, et. seq.; and, the very basic and profound purpose couched in the waiver of sovereign immunity contained and provided therein—both as to original suits against the government as well as to counterclaims.

POINT III

A BRIEF CONSIDERATION OF THE PURPOSE OF THE FOREIGN CLAIMS ACT AND THE RECORD OF THE DELIBERATIONS OF THE FRAMERS OF THE NATO-SOFA AGREEMENT AND THE REGULATIONS IMPLEMENTING THE ACT (32 C.F.R. Sec. 842.92, Rule 2, Note 2) CLEARLY SHOWS THE ERROR OF THE COURT BELOW.

1. The legislative history of the Foreign Claims Act,

said by Judge Marvin E. Frankel in his decision in the *Shafter case, supra*, to have implemented the NATO-SOFA TREATY, Title 10 U.S.C., Sec. 2734(a), (United States Code, Congressional and Administrative News, 87th Congress 2nd Session, 1962, Volume 2, p. 2456), recites for the purpose thereof as follows:

> "This bill, as amended, is not intended to make any substantive change in existing law."

Thus, if the legislation which was said by the Court below to have implemented the NATO-SOFA TREATY Agreement, was not intended to make any substantive changes in existing laws, it follows that there could not have been any contemplation, purpose or intent on the part of Congress to alter, withdraw, or substitute for, the jurisdiction of the District Court over the subject-matter of the wrongful death claims in Admiralty in this case against the government insofar as concerns the waiver of sovereign immunity under the Public Vessel's Act.

2. As to the record of the deliberations of the Framers of the NATO-SOFA AGREEMENT, neither Judge Walter R. Mansfield in the decision by the District Court below, herein; nor Judge Marvin E. Frankel in the *SHAFTER case, supra*, upon which the District Court and the Circuit Court based their erroneous opinions; had available to them or bothered to consider the minutes thereof respecting the intent and purpose relative to maritime claimants and legislation thereon.

In Volume LIV of International Law Studies, of Georgetown University Law Center, (1961) printed by the United States Government Printing Office, at page 466, par. 17(g), appears a proposed draft of a provision to include Third-Party maritime claims within the purview of the

NATO-SOFA TREATY AGREEMENT (Article VIII par. 5(h)); and, on pages 153-4, par's. 7 thru 13 incl., appears the complete and unequivocal rejection of the said proposal by the government—which, by the lower courts ruling is cast aside contrary to the intent and purpose thereof—in the nature of judicial fiat or legislation, as it were.

Thus, we find that there is no support for the lower Court's opinion, nor for the opinion of the Circuit Court of Appeals based thereon—which followed its lead without question or inquiry, as would be normal procedure under the circumstances, where far reaching and novel changes or interpretations of intent are ascribed to an unwitting Congress at the expense of the claimants herein without reason or logic on an entirely inequitable basis.

3. The regulations implementing the Foreign Claims Act, Title 32 C. F. R. Sec. 842.68 (a)(2) under the heading of "Counterclaims (NATO)"; recites as follows:

> "(2) Paragraph 5(h) Article VIII, also excludes from this provision claims arising out of or in connection with the navigation or operation of a ship or with the loading, carriage, or discharge of a cargo (See Subpart H of this part)."

It would seem clear from the foregoing that wrongful death claims arising from the operation of the USNS Blue Jacket, a Public Vessel of the United States, involved here in collision with the privately owned coastal freighter M/V Dirk would not be covered by the NATO-SOFA AGREEMENT; and afortiori; could be maintained against the United States under the Public Vessel's Act.

Under "Subpart H"—Admiralty Claims (10 U.S.C.

9801-9804 and 9806), as aforementioned, Section 842.92, Rule 2, Note 2, specifically provides that personal injury and death claims may be subject to suit under the Public Vessels Act; including the death claims of longshoremen who may be involved in the discharge of Public Vessels in Nato countries.

The holding of the Court below—which interprets the provisions of the NATO-SOFA agreement contrary to the interests of the claimants herein and in support of the interests of the government as well as the other claimants for property damages arising from the collision of the two vessels is arbitrary, irresponsible, capricious and indefensible as applied to the claims of the petitioners herein for wrongful death in Admiralty.

Such preferential treatment, respecting the subject-matter jurisdiction over claims in Admiralty of the District Court, does not apply to the United States Government or to the other property damage claimants and is an unwarranted and unconstitutional denial of equal protection of the laws to the petitioners herein.

There is no basis for this unequal and discriminatory treatment of wrongful death and personal injury claimants engaged in the maritime industry in international commerce and there is no legal or rational justification for such discriminatory treatment—particularly in a Court of Admiralty.

Conclusion

The decision of the Court below promotes the idea of a promiscuous, general allowance of absolute sovereign immunity which could undermine the whole structure of international trade which depends on prompt liquidation of monetary obligations.

The Sovereign immunity doctrine is no longer a healthy manifestation of society. It is, in fact, an excrescence on the body of the law, in that it encourages irresponsibility to world order, it generates resentments and reprisals. Sovereign immunity is a stumbling block in the path of good neighborly relations between nations, it is a sour note in the symphony of international concord, it is a skeleton in the parliament of progress, it encourages government toward chicanery, deception and dishonesty. Sovereign immunity is a colossal effrontery, a brazen repudiation of international moral principles, it is a shameless fraud and not in the nature of the principles of Admiralty Jurisprudence that formulates the historic law of the sea among the maritime nations of the world.

The decision of the Court below is not in accord with the law and untenably discriminates against personal injury and wrongful death claimants; unjustly depriving the petitioners of their substantive rights and equal protection of the laws under the Constitution; and, should be reversed and the petitioners be given an opportunity to be heard.

Respectfully submitted,

Francis J. Nicosia
Attorney for.
Defendant-Appellant

George G. Kilarjian,
Of Counsel.

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Appendix A — Judgment and Order of Affirmance of Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the thirty-first day of March one thousand nine hundred and seventy.

Present:

HON. IRVING R. KAUFMAN,

HON. WILFRED FEINBERG,

, Circuit Judges,

HON. WILLIAM H. TIMBERS,

District Judge.

Circuit Judges.

United States of America, as owner
of the USNB Blue Jacket,
Plaintiff-Appellee,
v.
Alfred M. Shafter, as next friend of the
deponents and next of kin of George Joseph
Kostka, Dr. Horst Willner, as Administrator

of the Estate of Georg Kostka, deceased,
the owner of the German motorship Dirk,
Albingia Versicherungs-Aktiengesellschaft,
and The British Marine Mutual Insurance
Association, Ltd.,
Defendants,
George G. Kilarjian,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order and judgment of said District Court be and they hereby are affirmed with costs to be taxed against the appellant.

A. DANIEL FUSARO Clerk

A true copy,
s/ A. Daniel Fusaro
Clerk

[U.S. District Court Filed Apr 30, 1970 S.D. of N.Y. Docketed As A Judgment Number 70,676 On May 1, 1970]

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 660—September Term, 1969.
(Argued March 31, 1970—Decided April 1, 1970.)
Docket No. 34340

UNITED STATES OF AMERICA, as Owner of the USNS Blue Jacket,
Appellee,

v.

Alfred M. Shafter, as next friend of the dependents and next of kin of Georg Joseph Kostka, Dr. Horst Willner, as administrator of the Estate of Georg Kostka, deceased, the owner of the German motorship Dirk, Albingia Versicherungs-Aktiengesellschaft, and The British Marine Mutual Insurance Association Ltd., Appellants.

Before:

KAUFMAN AND FEINBERG, Circuit Judges, and TIMBERS, District Judge.*

Appeal from judgment of the United States District Court, Southern District of New York, Walter R. Mansfield, Judge, denying leave to file counterclaims for personal injuries, wrongful death, and lost business, and denying motion for substitution of attorneys and representatives.

Affirmed.

Appendix B - Opinion of the Court of Appeals affirming order of District Court.

Francis J. Nicosia, New York, N.Y., for appellants.

Bruno Ristau, Washington, D.C. (William D. Ruckelshaus, Assistant Attorney General, Whitney North Seymour, Jr., United States Attorney, New York, N. Y., Morton Hollander, Philip A. Berns, Attorneys, Department of Justice, Washington, D. C., on the brief), for appellee.

Per Curiam:

Although we affirmed this case in open court we believe it advisable briefly to set forth our reasons.

We have jurisdiction to hear this appeal on two alternate grounds: (1) on the assumption that the application before the lower court may be treated as one for intervention as of right, and (2) that the proper evidence of substitution of attorneys and representatives, though not before Judge Mansfield at the time of his opinion, has been subsequently filed.

Upon the merits, we affirm on Judge Mansfield's thorough opinion, reported at —F.R.D.— (1969). We believe that the wrongful death and personal injury counterclaim was covered by the NATO-SOFA agreement, and thus not within the jurisdiction of the District Court.[1] See *Shafter v. United*

States, 273 F.Supp. 152, 153-56 (S.D.N.Y. 1967), aff'd *pe curiam*, 400 F.2d 584 (2d Cir. 1968), cert. denied, 393 U.S 1086 (1969).

[1] Appellant seems to have abandoned his counterclaim for lost business; in any case he does not urge that we review that portion of the judgment on appeal.

Appendix C - Opinion No. 36199 by J. Mansfield for the United States District Court for the Southern District of New York

Bernard Shafter
Proctor for Alfred Shafter, as next friend of the dependents and next of kin of Georg Joseph Kostka

Jacob Rassner, Esq., New York City, Of Counsel.

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MANSFIELD, D. J.

In this libel filed in May 1966 of the United States Government seeking recovery of damages suffered by its vessel as the result of a collision with a ship in which defendants had varying interests, one Francis J. Nicosia, who represents himself to be the substituted attorney for a defendant sued in a representative capacity (Alfred M. Shafter, as next friend of the dependents and next of kin of Georg Kostka) has moved pursuant to Rule 15(a) for amendment of defendant's answer

to substitute another person as the representative and, pursuant to Rules 13(a) and (f), F. R. C. P., for leave to file a counterclaim on behalf of such defendant. For the reasons stated below the motion is denied. The background facts are as follows:

On February 10, 1964, a vessel owned by the United States, the USNS Blue Jacket, collided with a German fishing boat, the M/V Dirk, which sank on the Weser river in the territorial waters of the Federal Republic of Germany. Six members of the Dirk's seven-man crew, including her captain and owner, George Kostka, were killed; the seventh survived, but suffered physical injuries.

On the 8th of May, 1964, in accordance with applicable provisions of the North Atlantic Treaty Status of Forces Agreement,[1] various representatives of the captain and crew of the Dirk, together with the compensation underwriters who had made payments to them, filed claims with the German Defense Costs Office for the deaths, personal injuries, and property damage suffered by the Dirk and its crew. On November 2, 1965, all such claims were denied. The Defense Costs Office in Bremen ruled that the property damage claims fell outside its jurisdiction, since Article VIII(5) (h) of the Status of Forces Agreement limited compensation under the treaty to claims for death or personal injury.[2] The death and personal injury claims were denied on the merits, the Defense Costs Office being of the opinion that on all the available evidence the collision had been solely caused by improper navigation of the Dirk.

The compensation underwriters promptly appealed pursuant to Article 12(1) of the Implementation Law providing for appeal to the German courts from determinations by the Defense Costs Office. No appeal was

taken by the individual representatives, who then resorted to remedies against the United States under the Public Vessels Act (46 U. S. C. §§781, *et seq.*) in the United States Courts.

Three separate suits followed. The first libel ("Shafter libel") was filed in this Court on November 10, 1965 (65 AD 1136), by Alfred M. Shafter, as next friend of the dependents and next of kin of Georg Kostka (the owner and master of the Dirk) and the members of his crew. In addition to stating causes of action for wrongful death and personal injuries, Shafter sued to recover for property damage arising out of the loss of the Dirk.

The second libel ("Kostka Estate's libel") was filed, also in this Court, on February 9, 1966 (66 Ad. 132), by Kostka's estate and two hull underwriters of the Dirk, Albingia Versicherungs-Aktiengesellschaft and the British Marine Mutual Insurance Association, Ltd., seeking recovery for property damage and loss arising out of the sinking of the Dirk. Discussions between counsel for Shafter and the Administrator of Kostka's estate as to their competing claims for the same property damages and loss led to the filing of a notice in 65 Ad. 1136, the original Shafter libel, "having the force and effect of an amended libel," whereby libelants in that action agreed to move at trial to strike "all claims predicated on property loss or damage."

The third libel (66 Ad. 477) ("Government libel"), out of which the instant motion arises, was filed by the United States on May 12, 1966, simultaneously with the filing of its answer in the Shafter trial. The Government sought recovery for damage suffered by the USNS Blue Jacket in its collision with the Dirk, and named as defendants Shafter, as next friend of the dependents and next of kin of Georg Kostka; Dr. Horst Willner, as administrator of the Kostka estate; and

the aforementioned two hull underwriters of the Dirk. The Kostka estate was joined as a respondent because of Kostka's ownership of the Dirk, and the Kostka heirs because of their liability under § 1967 of the German Civil Code for the liabilities of the estate.

On July 26, 1967, Judge Frankel granted the Government's motion for summary judgment dismissing the Shafter libel for want of jurisdiction of the subject matter. 273 F. Supp. 152 (S.D.N.Y. 1967).[3] The treaty arrangements constituting the North Atlantic Treaty Status of Forces Agreement, he held, "create a comprehensive and exclusive scheme for adjudication and settlement of claims within their purview," *id.* p. 153. Finding that the Blue Jacket had been part of a "force" governed by the provisions of the Agreement, he concluded that the Shafter claims for wrongful death and personal injuries, which were covered by paragraph 5(h) of Article VIII of the Agreement, must be considered withdrawn from the court's subject-matter jurisdiction. The Court of Appeals affirmed per curiam, 400 F. 2d 584 (2d Cir. 1968), and certiorari was denied.

Because Shafter's own action against the Government was pending at the time when he was named a defendant in the Government's libel for damages to the Blue Jacket (66 Ad. 477), he did not bother to reassert his claims for wrongful death and personal injuries as counterclaims in the latter suit. Now that his libel against the Government has been dismissed by Judge Frankel, however, he has apparently changed his mind. Francis Nicosia, purporting to act as substituted proctor for the Kostka heirs, moves pursuant to Rules 13(a), 13(f) and 15(a), F. R. C. P. for permission to substitute George G. Kilarjian for respondent Alfred M. Shafter, and to file a counterclaim against the Government seeking damages in the amount of $10,000 for Kostka's

wrongful death and $500,000 for loss of business as a result of the sinking of the Dirk.

The United States objects to the wrongful death counterclaim on jurisdictional grounds, arguing, *inter alia*, that Judge Frankel's opinion constitutes *res judicata* as to the court's jurisdiction over the subject matter of the claim. The Administrator of Kostka's estate and the two insurers object to the lost profits counterclaim on the grounds that it poaches upon their property damage territory in contravention of their earlier agreement with Shafter's attorney, Jacob Rassner. The Government also resists substitution of Nicosia for Rassner and of Kilarjian for Shafter, arguing that no substitution of attorneys has been filed with the Court and the papers fail to reveal any authorization from the defendants and next of kin for substitution of Kilarjian.

The Proposed Counterclaim for Wrongful Death and Personal Injuries

Movant rests his application upon the proposition that where a court has jurisdiction over the main claim, as this Court indisputably has over the Government's claim for property damage to the USNS Blue Jacket, it also has ancillary jurisdiction over compulsory counterclaims even though independent jurisdictional grounds may be absent and the Government has not expressly waived immunity.

Up to a certain point movant's hypothesis is sound enough. Although a permissive counterclaim under Rule 13(b), F.R.C.P., needs independent jurisdictional grounds to support it, a compulsory counterclaim—one arising "out of the transaction or occurrence that is the subject matter of the opposing party's claim," Rule 13(a), F.R.C.P.—does not. It is

regarded as ancillary or auxiliary to the main claim, and jurisdiction over that claim affords sufficient basis to adjudicate the counterclaim. 3 J. Moore, *Federal Practice* paragraph 13.15 (2d ed. 1968); *Moore v. New York Cotton Exchange*, 270 U. S. 593, 608-609 (1926). Here movant's proposed wrongful death and personal injury counterclaim, arising out of the same collision in which the Blue Jacket was damaged, would normally satisfy the requirements of a compulsory counterclaim. Rule 13(a) further provides that a claim meeting these requirements need not be stated if, at the time the main action was commenced, the claim was the subject of another pending action. Movant's failure to plead his counterclaim for wrongful death and personal injuries at the time the Government's libel was filed in 1966, therefore, does not prejudice his present attempt to do so.

Since the doctrine of auxiliary jurisdiction thus teaches that no independent jurisdictional ground is required for assertion of a compulsory counterclaim, a finding of lack of jurisdiction over such claims in a prior judicial proceeding would not ordinarily bar assertion of those claims as compulsory counterclaims in a later suit, any more than an earlier dismissal for want of jurisdictional amount would bar assertion of a $5,000 counterclaim for property damage in a subsequent action. Furthermore, when the United States sues in admiralty, an affirmative judgment may be rendered against it on a claim by respondent growing out of the subject matter of the Government's suit, regardless whether or not there has been a statutory waiver of sovereign immunity.[4] 3 J. Moore, *Federal Practice* paragraph 13.27, at 72-73 (2d ed. 1968); *United States v. National City Bank of New York*, 83 F. 2d 236, 238 (2d Cir.), *cert. denied*, 299 U.S. 563 (1936); *United States v. The Thekla*, 266 U.S. 328 (1924).

Although the proposed counterclaim might ordinarily be

asserted in such a suit, the right to do so here has been precluded by Congressional Assent to and implementation of the North Atlantic Treaty Status of Forces Agreement, since, as Judge Frankel found, the treaty created a comprehensive and exclusive scheme for adjudication and settlement outside of the federal courts of the claim which movants now propose to assert in the form of a counterclaim. The detailed treaty arrangements, as well as the implementing legislation passed in connection with the treaty, must be read "to exclude the concurrent and inconsistent jurisdiction" invoked by Shafter under the Public Vessels Act. 273 F. Supp. at 156. In giving its assent to the Status of Forces Agreement, the Senate took into consideration "that disposition of third-party claims by the Government of the place where the asserted wrong occurred (normally the country of the claimant's citizenship or residence, as in the case of the claimants here) would promote fairness, ease friction, and, incidentally, be likely to result in awards against the United States more modest than those commonly recovered in American courts." 273 F. Supp. at 156. All these functions of the treaty would be diluted if claimants were allowed to bypass the claims procedures specified in the Status of Forces Agreement by asserting such claims for adjudication in the district courts. Although permission to assert such claims by way of counterclaim would not open up the possibility of forum-shopping inherent in the right to initiate independent suits directly, the strong Congressional policies embodied in the Status of Forces treaty would be undercut in both cases.

None of the policies underlying the compulsory counterclaim rule are sufficiently compelling to override the Congressional determination to place exclusive jurisdiction of such claims elsewhere than in the federal courts. The genesis of the admiralty rule as to counterclaims was the manifest injustice of allowing a sovereign to press claims against a defendant who might well be entirely barred by the doctrine of sovereign immunity from bringing his own action in return. Here, however, we have an elaborate procedure specifically

designed to expedite claims against the United States for damage caused by its vessels. Movant cannot argue that he has been denied a full and fair opportunity to assert his claim against the United States. It may be true that at this point in the case, nearly three years after movant's decision to forego appeal through the German courts, no alternatives to this counterclaim remain open to him. But jurisdiction cannot be created in this Court by such a legal tactical decision.

The motion for leave to file a counterclaim for wrongful death and personal injuries must therefore be denied.

The Counterclaim for Lost Business

Movant also seeks to assert a counterclaim in the amount of $500,000 for lost profits on behalf of the heirs and next of kin of Georg Kostka as owner and master of the Dirk. No jurisdictional objection is or can be raised as to this portion of the motion: the Public Vessels Act, 46 U.S.C. § 783, specifically authorizes counterclaims for "damages arising out of the same subject matter or cause of action" as the Government's claim, and the Status of Forces Agreement, while it provides for adjudication of claims for death or personal injuries, does not apply to claims for property damage.

Upon the Government's commencement of the present suit, however, movant's claim for property damage was not the subject of another pending action. On March 16, 1966, Jacob Rassner, counsel for defendants and next of kin of the captain and crew of the Dirk, filed a notice in the original Shafter suit withdrawing "all claims predicated on property loss or damage, including any claim for loss of the vessel or cargo or personal effects." The notice further specified that "all claims for such relief are specifically reserved for and on

behalf of the respective libelants, which claims are to be asserted and prosecuted on their behalf by the firm of Haight, Gardner, Poor & Havens, Esqs."

Since movant's proposed counterclaim did not come within the exception provided in Rule 13(a) for claims which were the subject of another pending action, he was not barred from asserting it in Shafter's answer filed on June 10, 1966. He may now assert, therefore, only pursuant to Rule 13(f), which provides that when a pleader fails to set up a counterclaim through oversight, inadvertence, or excusable neglect, or when justice requires, he may by leave of court set up the counterclaim by amendment. No basis has been shown here for exercise of our power pursuant to Rule 13(f), which is discretionary. *Ferber Co. v. Ondrick*, 310 F. 2d 462 (1st Cir. 1962); *New Britain Machine Co. v. Yeo*, 358 F. 2d 397 (6th Cir. 1966). The record before us discloses no oversight, excusable neglect or any other reason justifying late filing. On the contrary, it reveals that defendant's counsel deliberately relinquished the claim to the Kostka estate's counsel, who then asserted it in the estate's separate libel. Movant's argument that Shafter only relinquished to the Kostka estate the claim for replacement cost, not the claim for lost profits, is sharply disputed by counsel for the estate who contends that the Administrator of the Kostka estate is the only party entitled to assert a claim for property damage of any kind and that there is no material distinction between the cost of replacement of the Dirk and loss of business because of its sinking. We find it unnecessary to resolve this finespun question for the reason that after considering all aspects, including the confusion that would result from further fragmentation of the claims, the motion must, in the exercise of our discretion, be denied.

Proposed Substitution of Attorneys and Representative of Dependents of Kostka

In his original suit Shafter acted as next friend for the dependents and next of kin of both Kostka and the other six crew members. Bernard Shafter served as proctor for Alfred Shafter, and Jacob Rassner was counsel for Bernard Shafter.

Movant now proposes that the Kostka dependents and next of kin split off from the dependents and next of kin of the other crew members, and proceed with Francis Nicosia as their new counsel and one George Kilarjian as the replacement for Alfred Shafter as next friend of the Kostka dependents. Apparently the two Shafters and Jacob Rassner would continue to represent the dependents and next of kin of the other crew members.

We cannot grant a motion for realignment of the parties' representatives without more complete documentation. Proper evidence of the consent of both principals to the Alfred Shafter-George Kilarjian substitution, and consent of all three principals to the substitution of Francis Nicosia for Bernard Shafter and Jacob Rassner, and of the real parties in interest represented by these respective attorneys, would first be required. We have before us only Kilarjian's affidavit asserting that he has "substituted Alfred M. Shafter as next friend of the dependents and next of kin of George Joseph Kostka," and that "My representation of the widow is fitting and proper in substitution for Alfred M. Shafter, and at the appropriate time proof of this representation will be submitted." No such proof has yet been offered. Nicosia's affidavit asserts that he has "substituted for Bernard Shafter, as proctor, and Jacob Rassner, as counsel herein." But we have nothing signed by Alfred Shafter, Bernard Shafter or any of the real parties in interest indicating their consent to such

changes.

For the foregoing reasons the motions for substitution of representatives and counsel are denied without prejudice to renewal upon proper papers.

It is so ordered.

s/Walter R. Mansfield
U.S.D.J.

Dated: October 3, 1969.

FOOTNOTES

1. Agreement of June 19, 1951, 4 U.S.T. 1792, to which the Federal Republic of Germany acceded by a Supplementary Agreement of August 3, 1959, effective July 1, 1963, 14 U.S.T. 531.

2. Paragraph 5(h) of Article VIII of the Agreement states that

> "[With immaterial exceptions] the provisions of this paragraph shall not apply to any claim arising out of or in connection with the navigation or operation of a ship or the loading, carriage, or discharge of a cargo, other than claims for death or personal injury to which paragraph 4 of this Article does not apply."

Paragraph 4 is a waiver of claims by the contracting governments against each other for injuries or deaths suffered by members of their armed forces in the course of official duties.

3. This apparently was a mispleaded Rule 12(b) (1), F.R.C.P., motion to dismiss. See 6 J. Moore, *Federal Practice* paragraphs 56.17 [36], 56.03 at 2052 (2d ed. 1966).

4. In this case there has in fact been a statutory waiver of sovereign immunity: the Public Vessels Act provides that

> "In the event of the United States filing a libel ... in admiralty for damages caused by a privately owned vessel, the owner of such vessel, or his successors in interest, may ... counterclaim against the United States in such suit for and on account of any damages arising out of the same subject matter or cause of action." (46 U.S.C. § 783.)

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 344

GEORGE G. KILARJIAN, ET AL.,
Petitioners,

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM OF PETITIONER IN REPLY

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MEMORANDUM OF PETITIONER IN REPLY

Respondent's opposition contends that the NATO-SOFA agreement precluded by Congressional assent the filing of Petitioner's counterclaim (Gov't Brief in Opp., p.1); and, that the said agreement vests exclusive jurisdiction over wrongful death maritime claims against the United States in a NATO host State in order to promote uniform treatment of compensation claims. (Gov't Brief in Opp., p.2)

Respondent assumes what cannot be proven; namely, that there is any affirmative indication by Congress of an intent to preclude the judicial allowance of a remedy for wrongful death under the Public Vessels Act to individuals in the situation of this petitioner.

Respondent by failing to answer must be deemed to have conceded that the framers of the NATO-SOFA AGREEMENT rejected the inclusion of third-party maritime claims within the purview of said AGREEMENT (par. 2, p. 14 of Pet.); and, that under the regulations implementing the Foreign Claims Act title 10 U.S.C., Sec. 2734 (a), as specified in title 32 C.F.R., Sec. 842.68 (a) (2) and Sec. 842.92 Rule 2 Note 2, personal injury and wrongful death claims against the United States arising in NATO countries may be subject to suit under the Public Vessels Act. (p.15 - 16 of Pet.)

The Public Vessels Act provides a remedy for wrongful death caused by the breach of a maritime duty imposed by Congress pursuant to federal maritime law. Established Congressional policy favors recovery in such cases in the absence of an affirmative legislative direction to except a particular class of cases. No exception, as claimed by Respondent, depriving wrongful death claimants of a remedy provided generally to all classes alike, is contained in any Congressional enactment or pronouncement of policy. It may not be presumed that Congress has ceded or surrendered the exclusive jurisdiction of the federal courts to foreign tribunals in suits such as brought by the Petitioner herein.

The Petitioner has been forclosed from pursuing her statutory remedy as provided by Congress; and, has also been deprived of her rights under the principles of general maritime law as enunciated in the recent landmark decision of this Honorable Court in Moragne v. States Marine Lines, Inc., 90

S. Ct. 1772 (1970).

The inequitable denial to maritime wrongful death claimants of remedies generally granted to all classes without exception in Congressional enactments in the maritime domain including the Public Vessels Act, in the absence of affirmative Congressional direction, is without legal basis or precedent and is not compatible with the modern concepts and policies of federal maritime law.

No such affirmative Congressional direction is specified by Respondent, nor does such direction or intent by Congress to single out and preclude the Petitioner from pursuing her remedy for wrongful death in the federal courts exist.

Neither is there any legal basis, either in precedent or policy, of permitting property damage claimants to pursue their remedies under the Public Vessels Act against the Respondent and, at the same time, to deny personal injury and wrongful death claimants, such as the Petitioner herein, the right to pursue their remedy for the identical breach of a maritime duty. This dichotomy is discriminatory, in violation of Congressional enactments clearly indicating just the opposite intent and policy, and, unwarranted in reason and justice.

This Honorable Court has consistently demonstrated a "strong concern for uniformity" in the exercise of admiralty jurisdiction which has been thwarted by the rulings of the lower courts in this proceeding.

The rulings of the lower courts in this proceeding, if permitted to prevail, will produce serious confusion and hardship not only to this Petitioner but to all other third-party maritime claimants for wrongful death. The

withdrawal of consent, as granted under our waiver statutes, from a particular class or group of claimants as here involved, without affirmative Congressional direction or authorization, introduces an unjustifiable anomaly in our jurisprudence which requires correction by this Court and vindication of federal policies; in the interest of uniformity in the exercise jurisdiction, "and the necessity of maintaining public faith in the judiciary as a source of impersonal and reasoned judgments." Moragne v. States Marine Lines, Inc., supra, page 1789.

The lower court conceded that the compulsory counterclaim might ordinarily be asserted herein (Pet. App. C6-C7). The bar to the assertion of Petitioner's counterclaim is untenable since there exists no affirmative Congressional direction withdrawing federal jurisdiction from suits such as that of the Petitioner arising from the collision of a privately owned vessel with a vessel owned by the Government of the United States.

It is well established that compulsory counterclaims arising from the subject matter of the identical breach of a maritime duty, as in the case of the collision herein, may be asserted regardless of jurisdiction over such counterclaim, when the United States sues in admiralty, whether or not there has been a statutory waiver of sovereign immunity. 3 J. Moore, Federal Practice paragraph 13.27, at 72-73 (2d ed. 1968).

Respondent should not be permitted to make a compensation case out of a third-party maritime claim. The erroneous holdings of the Courts below, based upon Respondents untenable contention, contravene the intent and mandate of Congress by unjustifiably foreclosing Petitioner's remedy for wrongful death and the District Court's exclusive

jurisdiction thereof, contrary to the express provisions of the Public Vessels Act and by usurping, as it were, this Honorable Court's historic responsibility for fashioning the controlling rules of admiralty law; thus, establishing irrational distinctions and anomalies in each instance hazardous to and incompatible with the general Congressional policies respecting maritime legislation to the extent that this Honorable Court's supervision and inquiry is clearly required in the spirit of its' decision in the Moragne case, supra as recently as June 15, 1970.

Respectfully submitted.

Francis J. Nicosia

Attorney for Petitioner

August 10, 1970

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IN THE
SUPREME COURT OF THE UNITED STATES

NO. 344

GEORGE G. KILARJIAN, et al.

Petitioner,

-against-

UNITED STATES OF AMERICA, as owner of the USNS BLUE JACKET,

Respondent.

ON PETITION TO REHEAR PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES

NO.

GEORGE G. KILARJIAN, ET AL

Petitioner

—against—

UNITED STATES OF AMERICA, as owner
of the USNS BLUE JACKET

Respondent

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

TO THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner respectfully petitions this Court to rehear his petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit, pursuant to subparagraph (2) of Supreme Court Rule 58, the said petition number 344 having been denied on October 12, 1970.

The original petition for a writ of certiorari was filed for the purpose of correcting the error of the lower court which untenably deprived your petitioner of the right to sue for personal injury and wrongful death as specifically provided under the Public Vessels Act and contrary to the implementing regulations in Title 32, C.F.R., Chapter VII, Secs. 842.68, 842.92 — Rule 2, Note 2, respecting Article VIII, paragraph 5(h) of the said NATO—SOFA Treaty Agreement which was relied upon by the Court below in its holding.

Petitioner earnestly believes that this Honorable Court has overlooked this sole controlling factor and authority by reason of your petitioner's injudicious inundation thereof in extensive and injudicious verbiage.

The fundamental reason for the original petition for a writ of certiorari was that the decision by the Hon. Walter R. Mansfield, United States District Judge, which was based on the holding of Hon. Marvin E. Frankel in the case of Schafter v. U.S.A. reported in 273 F. Sup. 152 (S.D.N.Y. 1967) and affirmed by the Circuit Court of Appeals on the same authority, decided a novel and vital question, heretofore undecided, which untenably modified maritime legislation and the exclusive jurisdiction of the Federal District Courts in such an unusual manner that it required review, clarification and adjudication by this Honorable Court; particularly insofar as the substantive rights of a large vital segment of maritime claimants to sue or counterclaim for personal injury and

wrongful death under the Public Vessels Act in the District Courts of the United States were abolished by virtue of the interpretation placed upon the NATO—SOFA Treaty Agreement by Hon. Justice Marvin E. Frankel.

Petitioner was denied his day in Court on the merits and his claim for personal injuries and death has been completely barred by reason of the said holding of the Court below, for which there is absolutely no precedent in Admiralty Law or maritime jurisprudence, and which is absolutely in conflict with the provisions governing such claims in the Code of Federal Regulations implementing the NATO—SOFA Treaty Agreement, as cited by your petitioner in the original petition for a writ of certiorari.

This conflict concerns the substantive maritime rights of our nationals, as well as nationals of foreign powers, and militates against the very purpose, spirit and intent of our Foreign Claims Act, Title 10, Section 2734 et seq. which Congress expressly intended to implement the speedy settlement of all meritorious claims, including maritime and admiralty claims, pursuant to the objective of maintaining the most friendly relations with foreign countries and their nationals.

The specific provisions of the Federal Regulations that definitely appear to be controlling on this present application, and which your petitioner frankly and earnestly believes have been inadvertently overlooked by this Honorable Court, by reason of your petitioner's error and not truly considered with regard to petitioner's substantive rights herein, are contained in Title 32, C.F.R., Chapter VII, Sections 842.68 and 842.92, Rule 2, Note 2, as contained in Exhibit 1 attached hereto and made a part hereof. Your petitioner's original petition for a writ neglected to recite that Chapter VII was the relevant chapter involved.

Title 32, Chapter 7, Section 842.68 entitled "COUNTERCLAIMS (NATO)" specifically provides in paragraph (a) (2), that paragraph 5 (h), Article VIII of the said NATO—SOFA Treaty Agreement excludes from its provisions all claims arising out of or in connection with the navigation or operation of a ship, or with the loading, carriage or discharge of cargo; nevertheless, the Court below erroneously held that your petitioner's counterclaim was barred by reason of the aforesaid provision of the NATO—SOFA Treaty Agreement.

The claim represented by your petitioner herein arises out of just such a situation involving a collision with a privately owned vessel, the M/V DIRK, resulting from the navigation and operation of the Public Vessel, namely the U.S.N.S. BLUE JACKET, by the respondent herein.

Section 842.90 entitled, "Subpart H, Admiralty Claims 10 U.S.C. 9801—9804 and 9806", governs the settlement, payment and compromise of all such claims and counter—claims under the NATO—SOFA Treaty Agreement. Section 842.92 thereunder defines and delineates all such claims that are payable or non—payable as they are classified by the Code of Federal Regulations under Chapter 7, wherein Rule 2 thereof, specifically governs maritime personal injury and death claims under the NATO—SOFA Treaty Agreement; and, quite clearly, Note 2, specifically states that personal injury and death claims are subject to suit under the Public Vessels Act.

Thus it plainly appears that the holding of the Courts below conflicts with the authority for suit by your petitioner under the Public Vessels Act, as specifically provided in the aforesaid federal regulations; and, your petitioner respectfully

feels that this conflict should be resolved, clarified and adjudicated upon review and brought under the supervision of this Honorable Court.

WHEREFORE, petitioner respectfully prays for a rehearing of his petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit, and further prays that at such rehearing this worthy Court will grant the Writ.

Respectfully submitted,

FRANCIS J. NICOSIA
Counsel for Petitioner

CERTIFICATE

The undersigned certifies that this petition is not made for the purpose of delay, that it is restricted to the purposes set forth in Supreme Court Rule 58 and it is presented in good faith.

FRANCIS J. NICOSIA
Counsel for Petitioner

§ 842.67 Processing NATO third party claims.

Rule	A If a claim arises—	B Then it will be—	C And—
1	From an act or omission of a member of a force or civilian component while performing official duty (see Note 1).	Settled or adjudicated by the receiving state under laws and regulations governing claims arising from activities of its own armed forces.	The receiving state pays any award or judgment subject to pro rata reimbursement by the sending state.
2	From any other act, omission or occurrence for which a force or civilian component is legally responsible (see Note 1).		
3	Out of a tortious unofficial act or omission by a member of a force or civilian component or the incident to the use of any military vehicle of the United States (see Note 2).	Considered by the receiving state, which submits to the sending state a report on the claim that includes recommendations on liability and amount of a fair and just award.	The sending state then determines whether to grant a award will be offered under its laws and in what amount (see Note 3).
4	Under rule 1, 2, or 3 and the U.S. vehicle or individual concerned is covered by a policy of liability insurance.	Referred to the insurer by either state.	The insurer settles and pays (see Note 4).

NOTES: 1. Except contractual claims and those to which paragraphs 6 and 7 of Article VIII apply.

2. Except when a force or civilian component is legally responsible under paragraph 6 of Article VIII (see paragraph 7).

3. If an award is made under Subpart E, G, or M of this part and accepted by the claimant in full satisfaction of the claim, payment will be made and the receiving state will be notified of the action taken.

4. If a noncombat claim is denied or not promptly paid, follow the procedure prescribed in Subpart E of this part for claims covered by insurance.

§ 842.68 Counterclaims (NATO).

(a) Under paragraph 5(a) of Article VIII, a receiving state is authorized to assert, adjudicate (litigate), or settle certain affirmative property damage claims on behalf of the United States.

(1) A foreign country may assert a claim on behalf of the United States only if it relates to a third party NATO claim arising from activities of U.S. military or civilian personnel.

(2) Paragraph 5(h), Article VIII, also excludes from this provision claims arising out of or in connection with the navigation or operation of a ship or with the loading, carriage, or discharge of a cargo (see Subpart H of this part).

(3) A receiving state may assert a counterclaim on behalf of the United States only if its laws and regulations permit a counterclaim in similar circumstances for its own armed services and do not require that the claim be assigned to it. However, the sending state office may authorize a receiving state office to take, in its own name, any legal action necessary to assert a claim and in particular, to assert the claim by set-off, counterclaim, or court action.

(b) The extent of a receiving state's obligation by treaty to present a counterclaim on behalf of the United States may depend on whether the particular counterclaim is discretionary or compulsory under its own laws governing counterclaims for its own armed forces. If a receiving state refuses to present a counterclaim on behalf of the United States in a proper case, the staff judge advocate, without further action, will report the refusal to AFJALD. Include with the report any explanation the receiving state gives for its refusal to process the counterclaim and a statement of its applicable law.

§ 842.69 International military headquarters.

(a) The Protocol, set up under the North Atlantic Treaty, defines the status of all headquarters and allied personnel stationed, assigned, or attached to SHAPE or its subordinate international military headquarters. (5 U.S.T. 870; T.I.A.S. 2978). It is now effective in all NATO countries except Canada and the Federal Republic of Germany.

(b) Claims provisions of the Protocol are included in Articles IV and VI. They provide that scope claims generated by allied personnel attached to an international headquarters are the responsibility of the international headquarters rather than the country to which the personnel belong. Claims caused by U.S. personnel assigned to these headquarters will be processed as shown in § 842.68.

Subpart H—Admiralty Claims (10 U.S.C. 9801–9804 and 9806)

§ 842.90 Scope of subpart.

This subpart tells how to settle, pay, and compromise claims for or against the United States that arise from marine accidents or incidents and are not the subject of pending litigation.

§ 842.91 Authority, waiver, and time limitation for admiralty claims.

(a) *Statutory authority*—(1) *Air Force.* 10 U.S.C. 9801–9804 and 9806 (authorizes administrative settlement, payment, and compromise of claims within its provisions; supplements 28 U.S.C. 1346, 2401, and 2402 and 46 U.S.C. 741–709 under which suits in admiralty may be brought against the United States).

(2) *Army.* 10 U.S.C. 4801–4804, and 4806.

(3) *Navy.* 10 U.S.C. 7365, 7621–7623, and 7625.

(b) *Waiver of interdepartmental claims.* The following procedure applies unless claim is payable by commercial underwriters. The interdepartmental waiver is predicated on the doctrine that property belonging to the Government is not owned by any department of the Government. The Government does not reimburse itself for the loss of its own property, with the following exceptions:

(1) Post Office Department claims.

(2) GSA vehicle damage claims.

(Maritime Administration vessels operating under a bareboat charter and Navy vessel chartered to commercial operators are covered by protection and indemnity (P&I) insurance; Government vessels operating under a general agency agreement, by $1,000 deductible P&I insurance for damage to Air Force shore structures only.) Do not make waiver determination in field; forward file to AFJALD.

(c) *Statute of limitations.* Claims against United States must be approved for settlement by Secretary of the Air Force or his designee and accepted by claimant within 2 years from date cause of action originated; thereafter no authority for administrative settlement exists. (When claims office receives notice of intention to file, it must advise the claimant or potential claimant of comprehensive application of this time limit.)

§ 842.92 Payable and nonpayable claims.

Rule	A If claim is for—	B Then it is—	
		Payable	Not payable
1	Property damage caused by a vessel of or in service of the Department of the Air Force (see Note 1).	X	
2	Personal injury or death of persons, including stevedores, not attached to the damaging Air Force vessel (see Note 2).	X	
3	Salvage rendered to vessels of or in service of the Air Force.	X	
4	Damage to or loss or destruction of property resulting from enemy action or directly or indirectly from an act of U.S. Armed Forces engaged in combat or in immediate preparation for impending combat.		X
5	Personal injury or death of U.S. Armed Forces members incurred incident to their service.		X
6	Personal injury or death of civilian employees of the United States to whom the Federal Employees' Compensation Act (5 U.S.C. 8101, et seq., formerly 5 U.S.C. 751) applies.		X
7	Damage or injury that is the subject of a suit or pending litigation to which the United States is a party.		X
8	Damage or injury cognizable under a status of forces agreement, such as NATO SOFA.		X

NOTES: 1. "Vessel" includes every description of water craft or other artificial contrivance used or capable of being used as a means of water transportation. Air Force parallels Government liability under the Suits in Admiralty Act (46 U.S.C. 741) and the Public Vessels Act (46 U.S.C. 781). Property damage has been construed to include, among other things, swell damage, damage to fish nets and lobster pots, and curb damage. 46 U.S.C. 740 extends admiralty jurisdiction to damage caused by a vessel to a land structure (such as a dock or pier).

2. These are also subject to suit under the Public Vessels Act.

[32 F.R. 14824, Oct. 26, 1967, as amended at 33 F.R. 2007, Jan. 31, 1968]

§ 842.93 Salvage claims.

(a) Salvage claims are limited to those for salvage services rendered to vessels